

United States Court of Appeals for the Fifth Circuit

No. 19-11000



A True Copy
Certified order issued Nov 10, 2020

Tyke W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

RODNEY B. ALLEN,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:16-CV-336

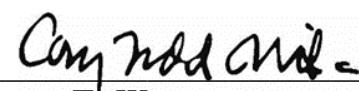
ORDER:

Rodney B. Allen, federal prisoner # 28935-077, was convicted of possession of a firearm by a convicted felon and sentenced to 293 months of imprisonment and five years of supervised release. Allen now seeks a certificate of appealability (COA) to appeal the district court's merits denial of his authorized successive 28 U.S.C. § 2255 motion challenging his Armed Career Criminal Act (ACCA) sentence enhancement based on the Supreme Court's decision in *Johnson v. United States*, 576 U.S. 591 (2015).

Reasonable jurists would not debate that Allen failed to show that it was more likely than not that he was sentenced under the ACCA's residual clause. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *United States v.*

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Clay, 921 F.3d 550, 558-59 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 866 (2020). Therefore, he has failed to show that the issues presented deserve encouragement to proceed further. *See Slack*, 529 U.S. at 484. Accordingly, Allen's COA motion is DENIED.



CORY T. WILSON
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-10399



In re: RODNEY BERNARD ALLEN,

Movant

A True Copy
Certified order issued Jul 19, 2016

Tyke W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

Motion for an order authorizing
the United States District Court for the
Northern District of Texas, Dallas to consider
a successive 28 U.S.C. § 2255 motion

Before JOLLY, GRAVES, and COSTA, Circuit Judges.

PER CURIAM:

In these consolidated cases, the Federal Public Defender (FPD) for the Northern District of Texas has moved to be appointed as counsel on behalf of, and at the request of, Rodney Bernard Allen, federal prisoner # 28935-077. The FPD has also filed a motion on Allen's behalf for authorization to file a successive 28 U.S.C. § 2255 motion based on the Supreme Court's recent decisions in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that the Armed Career Criminal Act's (ACCA) residual clause was unconstitutionally vague and *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016), which determined that *Johnson* is retroactively applicable to cases on collateral review. If granted authorization, Allen would challenge the district court's enhancement of his sentence under the ACCA based on his three prior Texas convictions for robbery and aggravated robbery with a deadly weapon.

No. 16-10399
c/w No. 16-10740

This court will not grant authorization to file a successive § 2255 motion absent a prisoner's *prima facie* showing that his claim relies on either (1) "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty of the offense" or (2) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." § 2255(h); *see* 28 U.S.C. § 2244(b)(3)(C); *Reyes-Quenya v. United States*, 243 F.3d 893, 899 (5th Cir. 2001). Allen has made "a sufficient showing of possible merit to warrant a fuller exploration by the district court." *Reyes-Quenya*, 243 F.3d at 899 (internal quotation marks and citation omitted).

Accordingly, IT IS ORDERED that the motion for authorization to file a successive § 2255 motion is GRANTED. Our grant of authorization is tentative in that the district court must dismiss the § 2255 motion without reaching the merits if it determines that Allen has failed to make the showing required to file such a motion. *See* 28 U.S.C. § 2244(b)(4); *Reyes-Quenya*, 243 F.3d at 899. We express no opinion as to what decisions the district court should make. IT IS FURTHER ORDERED that the FPD's motion for the appointment of counsel is GRANTED.

The Clerk is DIRECTED to transfer the § 2255 motion and related pleadings to the district court for filing as of the date the § 2255 motion was initially filed in the district court. *See Dornbusch v. Comm'r*, 860 F.2d 611, 612-15 (5th Cir. 1988).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RODNEY B. ALLEN,)
Movant,)
vs.) No. 3:16-CV-336-K
) No. 3:96-CR-256-K (1)
UNITED STATES OF AMERICA,)
Respondent.)

MEMORANDUM OPINION AND ORDER

Before the Court is Rodney B. Allen's (Movant) motion to vacate, set-aside, or correct sentence pursuant 28 U.S.C. § 2255. For the following reasons, the Court denies the motion.

I. BACKGROUND

After a jury trial, Movant was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). He was subject to a sentence enhancement under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), because he had a conviction for Texas robbery and two convictions for Texas aggravated robbery. He was sentenced to 293 months' imprisonment. The judgment was affirmed on appeal. *United States v. Allen*, 136 F.3d 137 (5th Cir. 1998), *cert. denied*, 118 S. Ct. 1399 (1998). Movant's first 28 U.S.C. § 2255 motion was dismissed as barred by the statute of limitations. *Allen v. United States*, No. 3:05-CV-1477-K (N.D. Tex. Jan. 16, 2006).

The Fifth Circuit authorized a successive § 2255 motion on the issue of whether his sentence under the ACCA was proper in light of *Johnson v. United States*, 135 S.Ct.

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2551 (2015). *In re Allen*, No. 16-10399 (5th Cir. Jul. 19, 2016). Although Movant is now on supervised release, his § 2255 motion is not moot, because if a ground regarding alleged sentencing error has merit and the movant is on supervised release, a court may grant relief in the form of a reduction in the term of supervised release. See *Johnson v. Pettiford*, 442 F.3d 917, 918 (5th Cir. 2006) (the possibility that the district court may alter the period of supervised release based on the petitioner having served excess prison time, prevents a habeas petition from being moot).

II. SCOPE OF RELIEF AVAILABLE UNDER § 2255

“Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice.” *United States v. Gaudet*, 81 F.3d 585, 589 (5th Cir. 1996) (citations and internal quotation marks omitted). It is well-established that “a collateral challenge may not do service for an appeal.” *United States v. Shaid*, 937 F.2d 228, 231 (5th Cir. 1991) (*en banc*) (quoting *United States v. Frady*, 456 U.S. 152, 165 (1982)).

III. ARMED CAREER CRIMINAL ACT

Movant contends that his sentence should not have been enhanced under the Armed Career Criminal Act (ACCA) for his prior Texas robbery and aggravated robbery convictions.

Federal law forbids certain people—such as convicted felons, persons

committed to mental institutions, and drug users—to ship, possess, and receive firearms. § 922(g). In general, the law punishes violation of this ban by up to 10 years' imprisonment. § 924(a)(2). But if the violator has three or more earlier convictions for a "serious drug offense" or a "violent felony," [Section 924 of] the Armed Career Criminal Act increases his prison term to a minimum of 15 years and a maximum of life. § 924(e)(1); *Johnson v. United States*, 559 U.S. 133, 136, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010). The Act defines "violent felony" as follows

any crime punishable by imprisonment for a term exceeding one year ... that—

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
- (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*. § 924(e)(2)(B) (emphasis added).

Johnson, 135 S.Ct. at 2555-56. Subsection (i) is known either as the force clause, *United States v. Lerma*, 877 F.3d 628, 630 (5th Cir. 2017), or as the elements clause, *United States v. Taylor*, 873 F.3d 476, 477 n.1 (5th Cir. 2017). The four offenses listed in subsection (ii) are referred to as the "enumerated offenses," *see United States v. Davis*, 487 F.3d 282, 285 (5th Cir. 2007), or as the "enumerated offenses clause," *Taylor*, 873 F.3d at 477 n.1. The remainder of the subsection is known as the "residual clause," *Johnson*, 135 S.Ct. 2555-56.

Johnson held that the imposition of an increased sentence under ACCA's residual clause violates the Constitution's guarantee of due process because the residual clause is unconstitutionally vague. *Johnson*, 135 S. Ct. at 2563. This holding is retroactively

available on collateral review. *Welch v. United States*, 136 S.Ct. 1257, 1268 (2016). After *Johnson*, a crime is a violent felony under ACCA only if it is one of the enumerated offenses, or if it qualifies under the force clause. *United States v. Moore*, 711 F. App'x 757, 759 (5th Cir. 2017) (per curiam).

A. Texas Robbery

The Texas robbery statute under which Movant was convicted provided in part:

- (a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he:
 - (1) intentionally, knowingly, or recklessly causes bodily injury to another; or
 - (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

Tex. Penal Code § 29.02(a).

The Fifth Circuit has recently held that Texas robbery is a violent felony under the ACCA, regardless of whether the offense was committed by injury or by threat of injury. *United States v. Burris*, 920 F.3d 942, 948-958 (5th Cir. 2019).

B. Texas Aggravated Robbery

The Texas aggravated robbery statute under which Movant was convicted provided in part:

- (a) A person commits an offense if he commits robbery as defined in Section 29.02, and he:

- (1) causes serious bodily injury to another;
- (2) uses or exhibits a deadly weapon; or
- (3) causes bodily injury to another person or places another in fear of imminent bodily injury or death, if the other person is:
 - (A) 65 years of age or older; or
 - (B) a disabled person.

Tex. Penal Code § 29.03(a).

Texas aggravated robbery is a violent felony under the ACCA. *See United States v. Nunez-Medrano*, 751 Fed. Appx. 494, 497 (5th Cir. 2018); *United States v. Lerma*, 877 F.3d 628, 633-36 (5th Cir. 2017). Because robbery is a necessary element of aggravated robbery, *see Lerma*, 877 F.3d at 633-34, and robbery is a violent felony, *see Burris*, 920 F.3d at 948-958, it necessarily follows that aggravated robbery is a violent felony.

IV. CONCLUSION

For the foregoing reasons, the § 2255 motion is **DENIED** with prejudice.

In accordance with Fed. R. App. P. 22(b) and 28 U.S.C. § 2253(c) and after considering the record in this case, the movant is DENIED a Certificate of Appealability. The movant has failed to show (1) that reasonable jurists would find this Court's "assessment of the constitutional claims debatable or wrong," or (2) that reasonable jurists would find "it debatable whether the petition states a valid claim of the denial of

a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

If the movant files a notice of appeal, she must pay the \$505.00 appellate filing fee or submit a motion to proceed *in forma pauperis* and a properly signed certificate of inmate trust account.

IT IS SO ORDERED.

Signed July 9th, 2019.



ED KINKEADE
UNITED STATES DISTRICT JUDGE

ORIGINAL

United States District Court

Northern District of Texas
Dallas Division

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

FILED

APR - 2 1997

NANCY DOHERTY, CLERK

By *[Signature]* Deputy

UNITED STATES OF AMERICA

v.

Case Number 3:96-CR-256-X (01)

RODNEY BERNARD ALLEN
Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, RODNEY BERNARD ALLEN, was represented by Joseph H. Lobley.

The defendant was found guilty on count(s) 1 by a jury verdict on December 16, 1996, after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Date of Offense</u>	<u>Count Number(s)</u>
18 USC §§ 922(g)(1) and 924(e)(1)	Felon in Possession of a Firearm	12/31/95	1

As pronounced on March 31, 1997, the defendant is sentenced as provided in pages 1 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of \$50, for count(s) 1, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 2nd day of April, 1997.

Joe Kendall
Joe Kendall
UNITED STATES DISTRICT JUDGE

Defendant's SSN: 464-33-7829

Defendant's Date of Birth: 02/10/65

Defendant's Address: 1109 Fairhaven; Garland, Texas 75242

Defendant's USM No: 28935-077

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Defendant: RODNEY BERNARD ALLEN
Case Number: 3:96-CR-256-X (01)

Judgment--Page 2 of 5

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **two hundred ninety-three (293) months.**

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this Judgment.

United States Marshal

By _____
Deputy Marshal

19-11000.26

Defendant: RODNEY BERNARD ALLEN

Judgment--Page 3 of 5

Case Number: 3:96-CR-256-X (01)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **five (5)** years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)

The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Fine and Restitution sheet of the judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
- 2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 4) The defendant shall support his or her dependents and meet other family responsibilities.
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 6) The defendant shall notify the probation officer within 10 days of any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

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Defendant: RODNEY BERNARD ALLEN
Case Number: 3:96-CR-256-X (01)

Judgment--Page 4 of 5

SPECIAL CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

The defendant shall refrain from incurring new credit charges or opening additional lines of credit without approval of the probation officer.

The defendant shall provide to the probation officer any requested financial information.

The defendant shall notify the probation officer at least 10 days prior to any change of residence. Standard Condition No. 6 will apply only to changes in employment.

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Defendant: RODNEY BERNARD ALLEN
Case Number: 3:96-CR-256-X (01)

Judgment--Page 5 of 5

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report and addendum except: the Court is not enhancing 2 levels for obstruction of justice.

Guideline Range Determined by the Court:

Total Offense Level:	33
Criminal History Category:	VI
Imprisonment Range:	235 to 293 months
Supervised Release Range:	3 to 5 years
Fine Range:	\$ 17,500 to \$ 175,000
Restitution:	\$ N/A

The fine is waived because of the defendant's inability to pay.

The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s): serious nature of the Criminal History Category - total criminal history points are 23 pts. which are 10 pts. higher than the maximum of the guideline table.

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